The application may be made upon motion, as in this case in term-time; or, by *habeas corpus* in term-time or vacation.

The above opinion is given as a step in the argument, still pending in the American courts, upon the important question indicated therein. Beyond referring to Hurd on Habeas Corpus, pp. 436-444, where the cases on both sides are collected and well discussed, we desire only to say, that the constitutional provision evidently contemplates the admission of all offenders to bail, except in a certain class of capital cases. The object of construction is to determine, first, in precisely what cases bail may, and in what it may not be allowed; and, secondly, by whom the grade of the offence on which the question of bailability depends, is to be determined. The constitution itself fixes the rule by which bailable are to be distinguished from non-bailable cases; "all persons shall be bailable, by sufficient sureties, unless for capital offences where the proof is evident or the presumption great;" which means, that bail shall not be allowed in such cases where there is direct proof of guilt that is convincing, or where the indirect proof from presumption, based upon circumstantial evidence, is reasonably conclusive. The main difficulty arises upon the second point. If, as is commonly the case, the arrest be made upon indictment found by a grand jury, either that body or the court which impanneled it, must pass upon the question of bailability. It is easy to say that a grand jury is not a proper tribunal to exercise so important a trust. It commonly acts, and must do so, upon *ex parte* evidence. When the law has recognised several grades of the same general offence, as of homicide, and made the highest not bailable, whilst the lower are bailable, nice questions of law must often arise upon which a grand jury ought not to be allowed to pass, and which yet are the only questions of difficulty in the case. In such a state of the facts, to refuse to listen to evidence tending to show that the offence was of a lower grade than that found by the grand jury, and so bailable, would be practically to nullify the constitutional guaranty. J. A. J.

County Court, Cook County, Illinois.

VAUGHAN *vs.* VAUGHAN.

The witness to a will may sign out of the presence of the testator, and afterwards acknowledge his signature in presence of the testator.

On the 26th day of October, the deceased requested his pastor, Asahel L. Brooks, to draw his will for him, and gave said Brooks directions how to draw the same, who went home, and in his study, and out of the presence of the testator, drew the instrument, and there signed his name to the same as a witness.

On the day following, said Brooks took said instrument to the

deceased, who was then sick in bed, and then read the whole will to him, together with the usual attestation clause, and the name of said Brooks in full, as signed thereto. The deceased expressed himself as satisfied therewith, and the witness Guilford then signed the same in the presence of the deceased, at his request. Said instrument was admitted to probate without any contest or notice to the heirs at law, and on the day following, James Vaughan, a brother and heir at law of the deceased, moved the court to set aside the probate, on the ground that the witness Brooks was not an attesting witness within the meaning of our statute.

B. G. Caulfield, for contestant.—Brooks is not an attesting witness in the language of the statute; and at the time he signed at his house out of the presence of the deceased, and the day before the will was executed, he was not an attesting witness, and no subsequent approval of the testator could change the character of that signature.

The witness must attest in presence of the testator: 1 Mallory 31, 32, *Watson* vs. *Pipes*, 32 Miss. (3 George) 451.

Where the witnesses sign in the presence of the testator, and before he signs, and he then takes the will and signs it, this is good, because all done at the same time: *Vaughan* vs. *Buford*, 3 Brad. 78.

If the several acts required by the statute are performed at the same time, and at periods of the same transaction, the order of them is immaterial: *Doe* vs. *Doe*, 2 Barb. 200; 2 Barb. 383; *Kenney* vs. *Whitmarsh*, 16 Barb. 141; 3 Brad. 36; Id. 353; *Lyons* vs. *Smith*, 11 Barb. 124.

Attestation is the act of witnessing an instrument of writing, at the request of the party making the same, and subscribing the same as a witness: 3 Camp. 232; 2 Smith R. 449; 2 Starkie on Ev. 332; 12 Wheaton 91; 1 Ves., jr. 12; 2 South R. 449; 1 Phillips on Ev. 410; 2 Dee 96; 2 Eng. Eccl. 60, 214, 289, 367.

If there were any doubt about the law of this case, it is removed by *Ragland* vs. *Huntington*, 1 Iredell 565, a case almost identical with the one now before the court.

Mather and *Taft*, contrà.—The case of *Cooper* vs. *Bockett*, 7 Eng. Eccl. R. 537, would bear against the due execution of Vaughan's will, were it not for the material difference between the English statute and the Illinois statute, and the final judgment of the court in favor of the will.

The words of the English statute are: "Such witnesses shall attest and shall subscribe the will in the presence of the testator."

Again. Our statute states, after requiring attestation, what the witness must swear to, and in the requisition does not require them to say that they signed or subscribed in the presence of the testator, which is a legislative construction dispensing with that feature, so often inserted in statutes, on the ground of "*expressio unius est exclusio alterius.*"

As to what is a sufficient signing, vide *Adams* vs. *Field*, 6 Washburn 265; *Knights* vs. *Crawford*, 1 Esp. N. P. 190; 1 Jarman on Wills 70; 2 Greenleaf on Ev. 49, note 1; *Swift* vs. *Wiley*, 1 B. Monroe 117.

It is a sufficient and a valid attestation, if the witness, when requested to attest the will, adopts the signature already on the instrument without subscribing it again: 2 Grattan 430; 6 Wash. (21 vol. 1) 270; *Ellis* vs. *Smith*, 1 Ves. Sen. 11; *Carleton* vs. *Griffen*, 1 Burr. 549; *Sarah Miles' Will*, 1 Dana 1; *Hale* vs. *Hall*, 17 Pick. 373; *Jones* vs. *Lake*, 2 Atk. 177; *Montgomery* vs. *Perkins*, 3 Metcalf (Ky.) 449.

JAMES B. BRADWELL, Probate Judge.—Under the English statute, which requires that the witnesses shall attest and subscribe the will in the presence of the testator, it has been held that a will must be subscribed by a testator before it is subscribed by the witness: *Cooper* vs. *Bockett*, 7 Eng. Eccl. R. 535; *In the Goods of James Byrd, deceased*, Id. 391; *In the Goods of G. L. Oldney deceased*, Id. 341. These cases, from the very loose manner in which they are decided, and as no authorities are cited, are not entitled to any great weight in determining the question now before the court, and more particularly as the English statute, by its express terms, requires that the witnesses must attest and subscribe their names in the presence of the testator, which language would seem to be much stronger than the language used in our statute. Even under a statute like the English, the Supreme Court of Kentucky have decided that the order of time in which the testator and witnesses sign their names is not material, and that the testator may sign after the witnesses: *Smith and Wife* vs. *Wiley*, 1 B. Monroe 114.

The same court say, in commenting upon this statute: "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things,

and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical, and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will is only to write on the same paper the names of the witnesses, for the sole purpose of identification. There may be a perfect attestation, in fact, without subscription; but to insure identity, and prevent the fraudulent substitution of any other document than that which had been published and attested, the statute providently requires the attesting witnesses to subscribe their names in the presence of the testator."

I do not consider the case of *Ragland* vs. *Huntingdon*, 1 Iredell's Law R. 565, cited with so much confidence by the counsel for the contestant, as authority in point, as I find upon examination that the statute upon which that case was decided required the will to "*be subscribed in the presence of the testator by two witnesses at least.*"

The case cited from Gilman was under the statute of 1818, which was like the English statute.

In the application of the word attested to the act of the witnesses, it must have been the intention of the legislature that the attention of the witnesses should be called to the condition of the mind of the testator at the time of signing or acknowledging the will, and the testator must not only sign or acknowledge it to be his will, but he must do it with the intention of making it his will. Consequently, the mental power or capacity of willing is necessary, as well as the corporal power of putting the name, to constitute a signing. It is the duty, then, of the persons required by the statute to be present at the execution of a will, not only to attest the corporal act of signing, but to try, judge, and determine whether the testator is of sound mind and memory at the time of signing.

Powell, in his Treatise on Devises, says, page 71: "But the liberal construction which the courts put upon the word 'signing' necessarily raises a question upon the import of the word 'attesting,' as applied to the instrument, viz., whether the witnesses were to attest the very act and *factum* of signing, or whether an acknowledgment by the testator that the act was done by him, and that it was his handwriting, was not sufficient to enable the witness to attest, for it was contended that this word should receive

a construction agreeable to the law and rules of evidence in other cases, and that as an attestation upon an acknowledgment was good in every other case, so in this an attestation on the acknowledgment of the testator that it was his handwriting, should be an attestation of the act of signing. And this, indeed, is a necessary conclusion, from the decision in the case of *Lemayne* vs. *Stanley*, Id. 72."

Under statutes providing that the testator shall "sign" his will in the presence of the attesting witnesses, any amount of authorities may be found that a simple acknowledgment by the testator that it is his signature to the instrument is sufficient.

In the case of *Sturdivant et al.*, vs. *Birchett*, 10 Grattan 67, "A will is executed by the testator, and certain persons are requested to attest it. For convenience they took it into another room, out of the vision of the testator, and there subscribe their names to the paper as witnesses, and they immediately, within one or two minutes, return to the testator with the paper, and one of them, with the paper open in his hand, addresses the testator, and says, 'Here is your will witnessed,' at the same time pointing to the names of the witnesses, which are on the same, and close to the name of the testator. The testator then takes the paper and looks at it, as if examining it, and folds it up, and speaks of it as his will, and the court held that under all the circumstances of the case the recognition of their attestation by the witnesses to the testator was a substantial subscribing of their names as witnesses in the presence of the testator, and that, too, under a statute similar to the English statute." Vide *Pollock* vs. *Grassell*, 2 Gratt. 439; *Rosser & Co.* vs. *Franklin*, 6 Gratt. 25.

It has been held in many American cases that the fact of the testator signing the will after the witnesses made no material difference, where it was one entire transaction: *Rosser & Co.* vs. *Franklin*, 6 Grattan 26.

Under our statute, a person may sign his name to a will even in the presence of the testator, and not be an attesting witness. It is not the act of signing his name and seeing the testator sign his name or acknowledge his signature to the will that makes him an attesting witness; something more is required. The witnesses must become such by the request of the testator, and the testator must in some way be conscious of the attestation of the witness. Perhaps it may not be too much to say that the witness writes his name on the will as evidence of the attestation required by

the statute, and for the purpose of identification, that the attestation would be incomplete unless the witness wrote his name, there can be no doubt.

The principal question in this case is, Can the witnesses to a will signed out of the presence of the testator afterwards adopt their signature in the presence of the testator? and upon this question it must be confessed that the authorities do not agree. We have seen that in numerous cases in Virginia, in Kentucky, and Vermont, it has been held that they can, and in South Carolina and one or two other states that they cannot.

Judge Redfield, in his very able work on Wills, page 247, note 6, says, that the law as laid down in 10 Grattan 67, above cited, is the only sensible view which can be taken of the subject; and in speaking of the decision, 3 Gratt. 439, upon the same point, says: "This seems to us altogether more reasonable than some of the nice refinements of the English courts upon this point:" Redfield on Wills, page 230, note 8.

I am of the opinion that under our statute the witnesses to a will may, in the presence of the testator and at his request, adopt their signature previously made out of the presence of the testator, and that from the time the witness Brooks received the instructions of the deceased until the will was executed the next day, it was one incompleted transaction; that what was said by the deceased to the witness Brooks at the time deceased signed the will, taken in connection with the action of said Brooks in reading aloud the will of the deceased, the attestation clause and the name of said Brooks as a witness thereto to the deceased, amounted to an adopting of the signature of said Brooks, made to the same in his study on the previous day, and operated as a present attestation to said will by said witness. It is very evident that the testator intended said Brooks should be a witness to his will; that he had every confidence in him; that the testator at the time he signed his name knew that Brooks had already signed his name as a witness to the will, and was then there in that capacity *attesting* the execution of the instrument by the testator, and scrutinizing his conduct so as to be able to testify at the proper time that all the requirements of the statute had been complied with.

I think that in this case the statute has been substantially complied with, and that to pronounce against this instrument would

be giving it a construction altogether too strict against testamentary right.

We have ventured to publish the foregoing opinion, although that of an inferior court, on account of its great research and innate good sense; and also because the subject is, of late, attracting considerable attention in the American states, in consequence of the inexplicable distinction which the English courts persist in maintaining between the signature of the testator and that of the witnessesto a will, admitting that in the former cases the adopting of a signature, made at any other time, is of the same force and validity as one made at the time of attestation; but insisting that this rule will not extend to the case of witnesses to the will, but that it is indispensable they should make their signatures at the time of attestation.

This is a degree of refinement which is not only unreasonable and unjust, but, as it seems to us, wholly incomprehensible, even to the profession. It is a distinction for which, to our apprehension, no substantial or appreciable reason ever has, or ever can be, assigned, and which is liable to induce great injustice. We must say, that with the American sense of propriety, and of always acting up to the fitness of things, we do not believe it would ever have occurred to any judge, or counsellor, in this broad empire, where ingenuity and narrow escapes are proverbial, that it would be possible to maintain any such distinction between the mode of attestation, by the testator and the witnesses.

We are not aware that any American court has yet indorsed the English doctrine, to the full extent; unless a late case in Vermont, decided by a divided court, and not yet reported, may be so considered; while there are numerous cases in this country which have adopted the natural and rational view: that there can be no essential practical difference between making and adopting a signature, by the witnesses, which will not apply, with the same force, to the testator.

When it is so apparent, from a careful examination of the English cases, that the strange discrepancy between the rule applied to the testator and the witnesses was one not adopted, of preconceived purpose, but was purely accidental, from following precedents, without precisely seeing, at first, that they were going to lead to any such incongruity, we do feel solicitous that the American courts, who are not embarrassed by any authoritative precedents upon the point, should so shape their course, as to escape the incongruity of a distinction without a difference; that they should either recede from the rule hitherto adopted and acted upon, with reference to the testator, or else that they should adhere to the same rule, in regard to the attestation by the witnesses, unless it can be made to appear that there is a substantial difference in the two cases, either as to the requirements of the several provisions of the statute applicable to each, or else in the nature of the two cases.

We trust it will not be demanded of us, by the profession, who have hitherto been so indulgent towards us, that we should offer any apology for publishing an opinion, which alludes, in so moderate terms, to our own humble judgment in the matter; but we do desire to say, in regard to the quotation from our book on the Law of Wills, that what we there said does not adequately express our present sense of the desirableness of having the American law upon the point so adjusted, that there shall

not continue this inexplicable difference in the form of attestation required from the witnesses to a will, and that allowed to the testator. We feel no hesitation in believing, that the conclusion towards which we have urged the American courts will be adopted by the English House of Lords, whenever the question shall come before that court of last resort for final adjudication. And it will be but poor evidence of the self-reliance of our own courts, to find them then, for the first time, adopting a rule of construction, in regard to the unanswerable propriety of which there could never have been entertained more than one opinion, by sound minds, when considered with regard to natural fitness and propriety, and aside from the authority of precedent. I. F. R.

Superior Court of New York City.

WILLIAM T. WILKINS *vs.* WILLIAM P. EARLE *et al.*[1]

Where a guest at an inn, in compliance with a general notice from the innkeeper, delivered to the clerk to be deposited in the safe, a sealed package, and in reply to an inquiry as to what it contained merely said "money," the innkeeper, on the loss of the package, was held liable only for an amount equal to reasonable travelling expenses.

General principles of the liability of innkeepers discussed.

Barney, Butler & Parsons, and *E. Pierrepont*, for plaintiff.

John McKeon, *F. Smyth*, and *W. F. Allen*, for defendants.

The opinion of the court was delivered by

ROBERTSON, C. J.—The liability of keepers of inns for property, which travellers, who are guests therein, bring with them, is as old as the existence of inns in England: Hollingshed's Chronicle, cited in Edwards on Bailment, App. 620. The whole doctrine in relation thereto is summarily stated in the recital of an ancient original writ, entered in the Register of Writs, f. 105, among writs of trespass (on the case), and set out at length in Fitzherbert's Natura Brevium 94 a, b. Such writ forms the groundwork of the early decision in *Calye's case*, 8 Rep. 32, in which the general principles embraced in such doctrine are evolved from such writ; all of which have some bearing on this case, and are in substance as follows:—

1. The place of loss is required to be an inn (*commune hospitium*), which is defined to be "a house where the traveller is fur-

[1] We are indebted for this case to the courtesy of John McKeon, Esq.—ED. AM. LAW REG.